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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GREG KUHNLE,

Plaintiff ,

vs.

LITHIA MOTORS, INC.
an Oregon Corporation,

Defendant.

Civ. No. 08-06209-TC

FINDINGS AND RECOMMENDATION

Coffin, Magistrate Judge:

Defendant Lithia Motors requests that the Court stay these proceedings pending arbitration pursuant to an arbitration clause contained in an employment agreement (#5). Plaintiff opposes the stay and contends that the arbitration agreement is unconscionable and therefore unenforceable. For the following reasons, defendant's motion to stay should be granted.

Background

Plaintiff brought this age discrimination and wrongful

1 discharge action against his former employer, defendant Lithia
2 Motors, requesting a jury trial. Defendant subsequently
3 requested that this Court stay the proceedings to allow the
4 parties to arbitrate the matter pursuant to a 2005 employment
5 agreement signed by the parties. That agreement states that "the
6 Company promotes a system of alternative dispute resolution which
7 involves binding arbitration to resolve all disputes which may
8 arise out of the employment context." The contract also states
9 that "the arbitrator shall be authorized to grant any relief that
10 would be available in a court of competent jurisdiction."

11 Notably, paragraph 3 of the contract states that "[e]ach
12 party shall bear the costs of their own attorney fees."
13 Plaintiff opposes a stay based on that provision, contending that
14 it makes the agreement unconscionable.

15 16 Standard

17 Defendant moves to stay the proceedings pursuant to the
18 Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, specifically
19 section 3, which states that "[i]f any suit or proceeding be
20 brought in any of the courts of the United States upon any issue
21 referable to arbitration under an agreement in writing for such
22 arbitration, the court in which suit is pending, upon being
23 satisfied that the issue involved in such suit or proceeding is
24 referable to arbitration under such an agreement, shall on
25 application of one of the parties stay the trial of the action
26 until such arbitration has been had" The FAA further
27 states that written agreements to arbitrate arising out of
28 transactions involving interstate commerce "shall be valid,

1 binding, irrevocable, and enforceable, save upon such grounds as
2 exist at law or in equity for the revocation of any contract."
3 9 U.S.C. § 2. If the issue is referable to arbitration under the
4 agreement, then the court must direct the issue to arbitration
5 and stay the trial. 9 U.S.C. § 3. An agreement to arbitrate is
6 to be "rigorously enforce[d]." Dean Witter Reynolds, Inc. v.
7 Byrd, 470 U.S. 213, 221 (1985).

8 We apply "ordinary state-law principles that govern the
9 formation of contracts" when determining the validity of an
10 arbitration agreement. Rogue v. Applied Materials, Inc., No. CV
11 03-1564-ST, 2004 WL 1212110, at *5 (D. Or. Feb. 20, 2004) (citing
12 Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir.
13 2002)). Under Oregon law, unconscionability is "a legal issue
14 that must be assessed at the time the contract was formed." Id.
15 (citing Best v. U.S. Nat'l Bank of Or., 739 P.2d 554, 556 (Or.
16 1987)).

17 Unconscionability has "both a procedural and a substantive
18 component." Vasquez-Lopez v. Beneficial Oregon, Inc., 152 P.3d
19 940, 948 (Or. App. 2007); see also Motsinger v. Lithia Rose-FT,
20 Inc., 156 P.3d 156, 159-60 (Or. App. 2007). Procedural
21 unconscionability refers to "the conditions of contract formation
22 and focuses on two factors: oppression and surprise." Vasquez-
23 Lopez, 152 P.3d at 948. Oppression refers to inequality in
24 bargaining power, precluding meaningful negotiation and choice.
25 Surprise "involves the extent to which the supposedly agreed-upon
26 terms of the bargain are hidden in a prolix printed form drafted
27 by the party seeking to enforce the terms." Id. (quoting Acorn
28 v. Household Intern, Inc., 211 F. Supp. 2d 1160, 1168 (N. D. Cal.

3 Findings and Recommendation

2002)). Substantive unconscionability refers to the terms of the contract rather than formation.

In Oregon, "substantial disparity in bargaining power, combined with terms that are unreasonably favorable to the party with the greater power may result" in an unconscionable provision. Carey v. Lincoln Loan Co., 125 P.3d 814, 828 (Or. App. 2005), aff'd, 157 P.3d 775 (Or. 2007). Such a scenario may involve deception or lack of genuine consent. Id. Both procedural and substantive unconscionability are relevant in Oregon, but only substantive unconscionability is "absolutely necessary." Vasquez-Lopez, 152 P.3d at 948. However, each case is decided on its own facts. Id.

Discussion

Plaintiff does not make a procedural unconscionability argument. Plaintiff makes a substantive unconscionability argument, contending in its opposition that Motsinger v. Lithia Rose-FT, Inc. controls because it is "peculiarly instructive" and involves the "very agreement" at issue in this case. Plaintiff is partly correct in that, although we do not have a complete copy of the Motsinger agreement, many, but not all, of the quoted provisions are identical. Although it is not clear whether the Motsinger agreement contained the language that "each party shall bear the costs of their own attorney fees," the court in that case focused on what the arbitration clause did not do: it did not exclude punitive or statutory damages or preclude an award of attorney fees "when otherwise provided by law." Motsinger, 156 P.3d at 166. The arbitration agreement in Motsinger was

1 enforceable.

2 In Hamrick v. Aqua Glass, Inc., Civ. No. 07-3089-CL, 2008 WL
3 2853992, at *5 (D. Or. Feb. 20, 2008), a similar policy stated
4 that "[e]ach party is solely responsible for the cost of any
5 attorney who might be retained." However, the policy also
6 stated that the arbitrator would have the same power and
7 authority as a judge to grant "monetary or other such relief as
8 may be in conformance with applicable principles of common,
9 decisional, and statutory law in the relevant jurisdiction." Id.
10 The applicable rules for arbitration allowed the granting of
11 attorney's fees and costs, and the defendant conceded at oral
12 argument that if the plaintiff prevailed on her claims, she would
13 be entitled to an award of attorney fees. Id. Although the
14 court held that the agreement was unconscionable because it
15 allowed the plaintiff to conduct only one deposition, the
16 attorney fee contradiction did not render the agreement
17 unenforceable.

18 In Asadourian v. Kuni German Motors, LLC, Civ. No. 07-240-
19 HA, 2007 WL 4388490, at *6 (D. Or. Dec. 13, 2007), the court
20 rejected another challenge to similar language in an arbitration
21 agreement. That agreement stated that the employee would have
22 the right to "hire legal representation, paid for by me." The
23 agreement also stated that "the resolution of the dispute shall
24 be based solely upon the law governing the claims...and the
25 arbitrator may not invoke any basis...other than such controlling
26 law." The court stated, and the defendants had acknowledged,
27 that the provision "secured for the plaintiff any statutory right
28 the plaintiff had to make the defendants pay for his attorney

1 fees." Id. at *6. In both Hamrick and Asadourian, the court
2 found that the provisions, to the extent that they, in essence,
3 allowed the plaintiff to recover attorney fees if she prevailed,
4 were enforceable.

5 The arbitration agreement at issue here contains similarly
6 contradictory language: each party will bear her own attorney
7 fees, but "[t]he arbitrator shall be authorized to grant any
8 relief that would be available in a court of competent
9 jurisdiction." Based upon the foregoing precedents, and because
10 we are to resolve any ambiguity against the drafter, see
11 Barcellos and Wolfson, Inc. v. Westland Water Dist., 899 F.2d 814
12 (9th Cir. 1990), the attorney fee language in this arbitration
13 agreement does not render it substantively unconscionable.

14 Conclusion

15 For the foregoing reasons, defendant's motion to stay (#5)
16 should be granted.

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20 Dated this 3 day of November, 2008.

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24 THOMAS M. COFFIN
25 United States Magistrate Judge
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